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No. ....
IN THE

Supreme Court of the United States

October Term, 1980

WILLIAM LEWIS HANSHAW,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Whether, under the ruling of this Court in *Roviaro v. United States*, 353 U.S. 53 (1956), the prosecution's refusal to disclose the informer's identity, where such information was relevant and helpful to the defense of the accused and was essential to a fair trial, required dismissal of the charges against Petitioner.

2. Whether, failure to produce the informant at trial, where the prosecution had promised production, and Petitioner had detrimentally relied on said promised production, deprived Petitioner of a fair trial.

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Petitioner, WILLIAM LEWIS HANSHAW, petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fourth Appellate District, in this case, entered on July 7, 1980.

Opinions Below.

The opinion of the California Court of Appeal, Fourth Appellate District, is not reported. The denial of petition for hearing in the Supreme Court of California is not reported.

Jurisdiction.

The judgment of the California Court of Appeal, Fourth Appellate District, was entered on July 7, 1980. A petition for hearing in the Supreme Court of California was denied on September 3, 1980. The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3).

Statement.

On August 3, 1979, Petitioner, WILLIAM LEWIS HANSHAW, was found guilty of violating Health and Safety Code, Section 11360, and sentenced to State Prison for two years with an enhancement of 1 year pursuant to Penal Code Section 11022(a).

A timely notice of appeal was filed on September 20, 1979. On July 7, 1980, the Court of Appeal, Fourth Appellate District, Division Two, filed its decision, affirming the judgment of the trial court in favor of respondent herein. The California Supreme Court denied Petitioner's petition for hearing on September 3, 1980.

On August 29, 1977, Orange County Sheriff's Officer, Bruce MacAffee, accompanied by informant, Paul Collin, went to the Hanshaw Liquor Store, allegedly for the purpose of arranging the purchase of a large quantity of marijuana.

At said liquor store, informant Collin introduced Officer MacAffee to Petitioner, WILLIAM HANSHAW, and to HERMAN RAY HANSHAW. At that location, the parties discussed the purchase of marijuana, and thereafter, Officer MacAffee and the informant went with HERMAN HANSHAW to the Hanshaw residence.

At the residence, they discussed the terms of the marijuana purchase, including quantity, price and the place the transaction was to take place. The following day, on August 30, 1977, the informant telephoned the Petitioner to again discuss the transaction.

On August 31, 1977, Officer MacAffee called the Hanshaw residence and was informed by WILLIAM HANSHAW that the purchase could be consumated. Officer MacAffee accompanied WILLIAM HANSHAW to near where the transaction was to take place. According to Officer MacAffee, he was to give WILLIAM HANSHAW part payment, to show good faith, and that the purchase would thereafter be completed.

Officer MacAffee then waited while WILLIAM HANSHAW obtained some marijuana and returned. WILLIAM HANSHAW was then placed under arrest. At the time of his arrest, WILLIAM HANSHAW had a firearm in his possession.[1]

At the preliminary examination, informant Paul Collin was determined to be a material witness by the Court, and, rather than disclose his location to Petitioner's Counsel, the prosecution entered into a stipulation with Petitioner's attorney, promising that the informant would be available at all times until trial, that he would be present at trial, and

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[1]The foregoing account of the circumstances leading to Petitioner's arrest is based upon Officer MacAffee's testimony at trial.

that service of subpoena upon Officer MacAffee would constitute service upon the informant.

The content of said stipulation is set forth below:

MR LEVY: Do you have a location or address where he (Paul Collin) may be reached if we may subpoena him for this case?

MR. BROOKS: We would stipulate that any request for interview or we would make available Mr. Collin for any forthcoming trial. He will be made available through the Orange County Sheriff's Department and the District Attorney's Office.

THE COURT: You can make him available at any time?

MR. BROOKS: Upon notice we'll be happy to make him available.

THE COURT: With that understanding I feel that it is sufficient, Counsel. If you want to interview him after this hearing or tomorrow sometime or anytime during the proceeding he'll be made available to you.

MR. LEVY: Anytime up and including trial he'll be made available?

THE COURT: Let me state this, that—are the People going to take the position that they are going to be able to make him available up until the time of trial at all times?

MR. BROOKS: We certainly will.

THE COURT: Counsel's decision, if he feels that he's a probative witness and if for some reason counsel is going to take the position that they've been denied a material witness in the case and move on Constitutional grounds for dismissal of the case based on that fact, and that's the responsibility of the People and the Sheriff's Office. If you want to undertake that, I'll take it.

MR. BROOKS: It is, and we'll accept service through Investigator MacAffee and the Orange County Sheriff's Department for Mr. Paul Collin and we'll make him available. He's in the building.

THE COURT: Just so it's understood. The People are taking the position that they can serve the District Attorney's office or serve the witness on the stand and service on these two people will be your responsibility and the Sheriff's responsibility to produce the witness at the time of trial or anytime they want.

MR. LEVY: Are they going to say that service of Mr. MacAffee is deemed to be service on—

MR. BROOKS: It is.

MR. LEVY: And the D.A.'s office?

THE COURT: Better be an individual.

MR. LESTER: Mr. Brooks.

THE COURT: Mr. Brooks or this gentleman on the stand.

MR. BROOKS: If it please the Court, your Honor, might it be designated Mr. MacAffee? I don't like to get involved with witnesses.

THE COURT: I'll make Mr. MacAffee. Then if Mr. MacAffee is not available—

MR. LESTER: Is Sergeant Mitchell available?

THE WITNESS: No, he's retired.

THE COURT: Investigator Leber is still with the Sheriff's Office.

MR. LESTER: Can we serve him too?

MR. BROOKS: So stipulated.

THE COURT: Show the stipulation.

MR. LEVY: So stipulated.

Thereafter, before trial, Petitioner's counsel served subpoena for Collin upon Officer MacAffee but the prosecution failed to produce the informant. The trial Court refused to be bound by the stipulation, and proceeded with the trial.

Reasons for Granting the Writ.

In *Roviaro v. United States*, 353 U.S. 53 (1956), the Court stated that "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege (to withhold disclosure of the informant's identity) must give way." 353 U.S. at 60-61. In *Smith v. Illinois,* 390 U.S. 129 (1967) the Court held that the identity of the witness does not refer merely to his name. "The witness name *and* address open countless avenues of in Court examination and out of Court investigation." 390 U.S. at 131. Finally, in *U.S. v. Hernandez*, 608 F.2d 741 (1979), citing *Smith v. Illinois, supra*, it was stated that "The address of a principal witness. . .is an integral element of identity for without such information, little meaningful inquiry can be made into background information affecting credibility." 608 F.2d at 745.

Roviaro holds that disclosure is not always mandated, the inquiry must be focused on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony. . .". 353 U.S. at 62.

In the instant case, the crime charged was the willful, unlawful and felonious transportation and sale of marijuana. The crime does not proscribe mere transportation and sale of marijuana, but "willful" transportation and sale. The Petitioner's knowledge and intent to transport and sell must be established. As in *Roviaro*, "this charge, when viewed in connection with the evidence at the trial, is so closely

related to (the informant) as to make his testimony highly material". 353 U.S. at 63.

Also, as in *Roviaro*, the circumstances of the case demonstrate that the informant's possible testimony was highly relevant and might have been helpful to the Petitioner's defense. Especially since the informant "had helped set up the criminal occurrence and had played a prominent part it". 353 U.S. at 64.

In the present case, there is no doubt that the informant was a material witness. There is no doubt that he played a prominent part in the criminal occurrence. He introduced the undercover sheriff's officer to the Petitioner. He was present when the terms of the impending transaction were discussed. He telephoned the Petitioner the day before the transaction to insure that the transaction would take place. He was determined to be material by the Trial Court at the Preliminary Examination, and prior to the time disclosure of the informant's identity was sought.

Without the informant's testimony and opportunity for cross-examination by Petitioner's counsel, the Trial Court was compelled to rely on the uncorroborated testimony of Officer MacAffee. The Petitioner and Court were placed in this position solely because the prosecution refused to disclose the informant's identity.

The informant's testimony could have possibly shown that the Petitioner did not have the requisite knowledge or intent to be convicted of the offense charged. Or, "His testimony might have disclosed an entrapment." *Roviaro, supra*, 353 U.S. at 64.

The prosecution sought to circumvent their duty of disclosure, as set forth under *Roviaro, supra*, by stipulating in open Court with defense counsel that, it would withhold information as to the informant's whereabouts *but*, in ex-

change for such concealment, the prosecution would insure that it would produce the informant at trial.

This stipulation was entered into freely by the prosecution. They were not forced or compelled to so stipulate. The prosecution could have easily complied with its duty as set forth in *Roviaro, supra*. Rather, they insisted upon withholding informant information and entered into this stipulation. The prosecution thereby freely accepted the burden of producing the informant rather than suffer a dismissal at the Preliminary Examination for refusing to disclose information concerning the informant who had been determined to be a material witness. Although it has been stated that *Roviaro* requires only the duty to identify the informant, and not the duty of production, (*United States v. Cimino*, 321 F.2d 509, 512), in this case the prosecution promised production.

The petitioner gave up his right to disclosure of the informant's identity, in exchange for a promise that the informant would nevertheless, be present at trial. The Petitioner suspended all investigation into the informant's whereabouts reliant on this promise.

Therefore, even assuming that the stipulation herein was not binding on the prosecution and Court, (a question not presented at this time), the Petitioner's reliance thereon, in waiving his right to disclosure of the informant's identity, was sufficient prejudice to either require dismissal or disclosure of the informant's identity at trial. It is important to note that, despite the position in which the prosecution had placed the Petitioner when it failed to produce the informant at trial, the prosecution never came forward at trial offering to disclose the informant's identity.

Furthermore, the prosecution did not use due diligence to locate the informant. The informant was in custody on

a criminal matter two months prior to the trial, and this fact was known to the Orange County Sheriff's Department, but they made no attempt to retain custody of him as a material witness. This is true although the Sheriff's Department knew the informant to be an unreliable person who might, and probably did, "skip" town rather than testify.

This is not a case where the potential informant information goes to probable cause to arrest or search (*McCray v. Illinois*, 386 U.S. 300 (1966)). In the instant case, asin *Roviaro*, the informants potential testimony goes directly to guilt or innocence of the Petitioner.

For the foregoing reasons, it is clear that the informant's identity was critical to a fair trial. Failure to disclose the informant's identity, or produce the informant at trial as promised, deprived Petitioner of a fair trial.

Conclusion.

It is respectfully submitted that the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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APPENDIX A.
Opinion.

Court of Appeal, Fourth District, Second Division, State of California.

People of The State of California, Plaintiff and Respondent, v. Herman Ray Hanshaw and William Lewis Hanshaw, Defendants and Appellants. 4 Crim. 12034, (Sup Ct.C-39480).

Filed: Jul. 7, 1980.

APPEALS from the Superior Court of Orange County. Mason Fenton, Judge. Affirmed.

Patrick D. Crail for Defendant and Appellant Herman Ray Hanshaw.

Howard Allen Levy for Defendant and Appellant William Lewis Hanshaw.

George Deukmejian, Attorney General, and Bruce Daniel Rosen, Deputy Attorney General, for Plaintiff and Respondent.

Defendants were convicted of sale of marijuana.

Operating through a confidential informant, Paul Collin, officers bought substantial amounts of marijuana from these defendants. The issue on appeal is the availability of the informant Collin.

At the preliminary it was agreed that the prosecution would make Collin available upon notice. The district attorney said that the prosecution would accept service of the subpoena upon an investigator of the Orange County Sheriff's office. This would be deemed service upon Collin. The court said it took from this statement that if for some reason the witnesses were not available it would be the defendants' position that they had been denied a material

witness and would move to dismiss. The district attorney agreed to this statement of the court.

At ten o'clock on the morning of trial, the investigator was served with a subpoena ordering Collin to appear at nine o'clock that morning. The court gave the district attorney five days to find Collin and when a showing was made of a good faith effort to locate Collin, the court denied a motion to dismiss based upon the failure to produce him as a witness.

As the attorney General says, the defendants engage in some very creative reading of the record to read into it any binding stipulation on the part of the district attorney that the case *would* be dismissed if Collin were not made available. The district attorney agreed to produce Collin. However, he did not stipulate that if Collin were unavailable that the case would be dismissed and the facts do not demand such a sanction. The defendants' contention that a stipulation existed which guaranteed dismissal is without basis.

Collin was undoubtedly a material witness. He was available at the time of the preliminary. He was available at the arraignment. He was available when the case was originally set for trial. At that time the defendants pled guilty. Then they changed their pleas. The district attorney then produced Collin for an interview with defense counsel. No further attempt to contact Collin was made until ten o'clock on the morning of trial when a subpoena was served on the investigator ordering that Collin be produced at nine o'clock that morning.

When Collin showed up missing on the morning of trial, the prosecution made a showing of a good faith attempt to locate him, complying completely with the mandates of *Eleazer*. The prosecution contacted two private investigators for whatever investigation they had. They made personal

checks on Collin's parents and his sister. They checked the business address where he had recently been. They conducted a "drive-by" in the Huntington Beach area looking for his vehicle. They checked a post office box, a bar and an answering service allegedly used by him. Attempts were made to have the Sheriff's Warrant and Fugitive detail serve an outstanding warrant for his arrest. These facts support a finding of due diligence on the part of the trial court.

Judgments affirmed.

NOT FOR PUBLICATION.

/s/ Gardner, *P.J.*

We concur:

/s/ Tamura, *J.*

/s/ Morris, *J.*